Supreme Court, U.S.
FILED
AUG 17 1994
OFFICE OF THE CLERK

(2)

No. 93-1644

In the Supreme Court of the United States

OCTOBER TERM, 1994

JAMES R. BURCHARD AND JUNE P. BURCHARD,
PETITIONERS

v.

JOHN H. DALTON, SECRETARY OF THE
DEPARTMENT OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether petitioners filed a timely notice of appeal.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 6a-9a) is unpublished, but the decision is noted at 12 F.3d 1105 (Table). The opinion of the district court (Pet. App. 11a-16a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 1993. A petition for rehearing was denied on January 11, 1994. Pet. App. 10a. The petition for writ of certiorari was filed on April 11, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner James R. Burchard (Burchard) worked as a temporary Reactor Plant General Foreman at the Puget Sound Naval Shipyard from 1977 to 1981. When Burchard was not promoted to the newly opened position of permanent Reactor Plant General Foreman, he filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging age discrimination. Pet. App. 11a-12a.

Burchard's EEOC complaint was resolved in a settlement agreement reached with the Department of the Navy on March 30, 1983. The agreement provided that the Navy would alter his personnel record so that it would reflect that he retired at the position of permanent Reactor Plant General Foreman. Burchard, in turn, agreed to withdraw his EEOC complaint and to refrain from bringing any further administrative or civil actions based on the complaint. Pursuant to the agreement, Burchard's personnel record was changed on April 5, 1983, to list his pay status as a permanent Reactor Plant General Foreman through the date of his formal retirement, May 17, 1982. Pet. App. 12a.

2. On January 24, 1992, Burchard and his wife, petitioner June P. Burchard (collectively, petitioners) filed a pro se complaint in the United States District Court for the Western District of Washington alleging a breach of the settlement agreement. Petitioners claimed that the Navy had used the wrong retirement date and thus had computed some benefits incorrectly. Pet. App. 11a, 12a. The district court granted the Navy's motion for summary judgment on February 22, 1993, on the ground that the applicable six-year statute of

limitations, found in 28 U.S.C. 2401(a),[1] had expired. Pet. App. 13a-16a.

3. The court of appeals dismissed petitioners' appeal for lack of jurisdiction due to an untimely notice of appeal. Pet. App. 6a-9a. The court of appeals noted that, because the district court's judgment was entered on February 22, 1993, petitioners were required by Fed. R. App. P. 4(a)(1) to file a notice of appeal by April 21, 1993.[2] The court found, however, that petitioners did not do so until April 26, 1993. Pet. App. 8a. Therefore, the court of appeals held that petitioners' notice of appeal was not timely filed. *Id.* at 9a. The court of appeals subsequently denied petitioners' petition for rehearing. *Id.* at 10a.

ARGUMENT

Petitioners argue that their notice of appeal was timely filed. Pet. 5-6. It was not.

When the United States is a party, a notice of appeal must be filed within 60 days after the date of entry of judgment. See Fed. R. App. P. 4(a)(1). This requirement is mandatory and jurisdictional. See, *e.g.*, *Munden* v. *Ultra-Alaska Assocs.*, 849 F.2d 383, 386 (9th Cir. 1988), citing *Browder* v. *Director, Dep't of Corrections*, 434 U.S. 257, 264 (1978). Because the district court's judgment was entered on February 22, 1993, see Pet. 4; Pet. App. 8a, 11a, petitioners were required to file their notice of appeal by April 23, 1993.

---

[1] Section 2401(a), "the general statute of limitations governing actions against the United States," *United States* v. *Mottaz*, 476 U.S. 834, 838 (1986), provides in relevant part that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."

[2] According to our calculations, sixty days from February 22 was April 23, 1993. Even so, petitioners' notice was out of time.

The only notice of appeal received by the district court in this case was a letter written by petitioners and dated April 12, 1993. Pet. App. 1a. This letter was stamped as having been received by the district court on April 26, 1993, App., *infra*, 1a, and filed by that court on April 27, 1993, App., *infra*, 2a. Receipt on even the former date was three days out of time.

As the court of appeals noted (Pet. App. 8a-9a), petitioners alleged in the court of appeals that they originally sent a notice of appeal to the district court by certified mail on March 12, 1993, and that on April 12, 1993, they discovered that they had sent the notice to the wrong address. Petitioners also alleged that, upon learning of their mistake, they mailed a second notice of appeal on April 12, 1993. The letter received by the district court on April 26 also alleges that a letter dated March 12 was mailed by petitioners and was "lost." App., *infra*, 1a; Pet. App. 1a.

In their petition, petitioners now allege for the first time that, on April 13, 1993, they sent their notice of appeal to the clerk of the district court and that the district court received the notice of appeal on April 14, 1993. Pet. 4, 6. Petitioners also allege for the first time that on April 16, 1993, they sent their notice of appeal to the clerk of the court of appeals, and that the court of appeals received the notice of appeal on April 19, 1993. *Ibid.* In support of these claims, petitioners have produced certified mail receipts indicating that the district court and the court of appeals received mail from petitioners on April 14 and April 19, respectively. Pet. App. 2a-5a. However, these receipts do not indicate what it was that petitioners sent to the district court and the court of appeals.

Neither petitioners' new factual assertions nor the certified mail receipts with which petitioners have now

come forward establish that petitioners' notice of appeal was timely filed. The earliest date stamped on the notice of appeal filed in the district court is April 26, 1993. App., *infra*, 1a. That notice of appeal was apparently filed at least three days out of time. The government has examined the records before the district court and the court of appeals and has failed to locate any timely filed notice of appeal.

The government did discover, in the record before the court of appeals, a memorandum dated May 13, 1993, written by the deputy clerk of the district court. App., *infra*, 3a. The memorandum indicates that on April 19, 1993, the district court received from petitioners several documents, including one styled "Appeal of Initial." These documents are reproduced in the Appendix to this brief. See App., *infra*, 4a-8a. The memorandum also indicates that Mrs. Cooney, a "representative" of petitioners, informed the deputy clerk at some later date that the documents received on April 19 were intended to constitute a notice of appeal from the district court's summary judgment order in this case. App., *infra*, 3a.[3] A notice of appeal of the district court's order received on April 19 would have been timely filed. None of the documents reproduced in the Appendix, however, can fairly be read as a notice of appeal of the district court's order, even allowing for the fact that petitioners are pro se. It is noteworthy that the lead document, styled "Appeal of Initial," has an "Equal Empolyment [*sic*] Opportunity Commission" caption and bears no resemblance to the letter received by the district court on April 26—which expressed petitioners' desire to appeal

---

[3] The memorandum refers to "the Rothstein case." Barbara J. Rothstein was the district judge in this case. Pet. App. 16a.

the district court's order. Compare App., *infra*, 1a with App., *infra*, 4a-5a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

AUGUST 1994

APPENDIX

C58

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
UNITED STATES COURTHOUSE
2ND FLOOR
SEATTLE,WASHINGTON 98104

APRIL 12th 1993

(ORINGIAL DATE OF LOST CERTIFIED LETTER
MARCH 12th 1993)P 886 414 713

JAMES ROBERT BURCHARD
JUNE P BURCHARD PLAINTIFF
996 OLNEY STREET EAST
PORT ORCHARD,WASHINGTON 98366
phone 206-876-3281

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF SEATTLE,
AT SEATTLE

NUMBER C92-102R

ORDER GRANTING DEFENDANTS MOTION FOR SUMMAry judgement

PLIANTIFF WISH TO APPEAL THE DECISION

PLAINTIFF DID NOT HAVE OPPORTUNITY HIS DEPOSITION,NOR PRE TRIAL, NOR MEDIATION,PLAINTIFF WAS ACTING PROSE,PLAINTIFF REPORTED PROHIBITED DISCRIMINATION,DEFENSE USED AGE DISCRIMINATION FOR COURT.

PLIANTIFF ONLY WANTED TO DEAL WITH DISCRIMINATION ,NOT ANYTHING TO DO WITH MERIT PROMOTIONAL,THEREFORE THE CASE WAS TOP HEAVY WITH THE DEFENSE PAPER.

ON PAGE ONE DOCUMENT CASE C92-102R ORDER GRANTING DEFENDANTS MOTION FOR SUMMARY JUDGEMENT ,U.S.DISTRICT COURT AT SEATTLE,WA PAGE ONE BACKGROUND,LINES 23,24,25,26,page TWO LINES 1,2,3,4 UNTRUE PLAINITIFF DID NOT HAVE OPPORTUNTIY TO CHALLENGE OR ANSWER BASICALY A BUNCH OR UNTRUE AND UNEEDED PAPER.

THEREFORE PLAINITIFF ASKED FOR AN APPEAL.

SINCERELY

JAMES ROBERT BURCHARD
PROSE

JUNE P.BURCHARD,
WIFE

COPIES
SEATTLE AND CALIFORNIA U.S. COURT APPEALS,

THE ORIGINAL THE CERTIFED LETTER SUBMITTED MARCH 12th 1993,no P 886 414 713 have been signed by a clerk,but unkown because we can not read his signature

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
UNITED STATES COURTHOUSE
2ND FLOOR
SEATTLE,WASHINGTON 98104

FILED
LODGED
RECEIVED
MAIL
APR 27 1993
AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

APRIL 12th 1993

(ORINGIAL DATE OF LOST CERTIFIED LETTER
MARCH 12th 1993)P 886 414 713

JAMES ROBERT BURCHARD
JUNE P BURCHARD PLAINTIFF
996 OLNEY STREET EAST
PORT ORCHARD,WASHINGTON 98366
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THEREFORE PLAINITIFF ASKED FOR AN APPEAL.

ENTERED
ON DOCKET
MAY 03 1993
By Deputy

SINCERELY

JAMES ROBERT BURCHARD
PROSE

JUNE P.BURCHARD,
WIFE

COPIES
(SEATTLE AND CALIFORNIA U.S. COURT APPEALS,)

THE ORIGINAL THE CERTIFED LETTER SUBMITTED MARCH 12th 1993,no P 886 414 713 have been signed by a clerk,but unkown because we can not read his signature.

1/7

07/08/94 13:56 002

MEMORANDUM
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
at Seattle

93-35425

TO: MPGregory, Appeals Clerk

FROM: LBRogers, Deputy Clerk

DATE: 5/13/93

RE: James Burchard, C92-102R

Today I spoke with a Mrs. Cooney, a representative for the above-named individual. She indicated that the attached paperwork is to be put with the Notice of Appeal of Mr. Burchard in case number C92-102R. The reason that I have had the paperwork is because Mr. Burchard forwarded the paperwork to me on 4/19/93 with no explanation. The top document, Appeal of Initial, did not indicate a U.S. District Court case number and appeared to be appealing an EEOC decision. I subsequently put it on my "P" List to await a $120.00 filing fee for a civil case. I later found out through the Cooneys that the attached paperwork was intended to be for his appeal of the Rothstein case. Please attach the aforesaid to his appeal.

If you have any questions, let me know.

cc: James Burchard

RECEIVED
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS
MAY 19 1993
FILED
DOCKETED
DATE

EQUAL EMPOLYMENT OPPORTUNITY COMMISSION
OFFICE OF FEDERAL OPERATIONS
P.O BOX 19848
WASHINGTON,D.C 20036

APR 19 1993

JAMES R. BURCHARD,
Appellant,

v.

DEPARTMENT OF THE NAVY,
Agency.

APPEAL NO. 01911883
AGENCY no. 81-30

APRIL 15th 1993

APPEAL OF INITIAL

APPELANT STATEMENT OF DISCOVERY

DID NOT HAVE THE OPPORTUNITY TO ANSWER THIS DOCUMENT,SAW IT JUST THREE DAYS AGO,THIS IS FINALY SOMETHING TO GET SOMETHING DONE.

ISSUE

THE OWCP DOCUMENT OCTOBER 22nd 1993,MS KATHLEEN M.DUANE CLAIMS EXAMINER AND MS JOAN PRIMM A SUPERVISOR IN PM MEMO TO THE FILE, TALKED TOGETHER ABOUT THE TREATMENT OF APPELLANT,OCCUPATIONAL ILLNESS DISABILITY. EXHIBIT 1 ATTAHED

ALLENMORE CONFIDENTIAL PSYCHOLOGIST EVALUATION ,ATTACHED ,THEY WERE ADMITTING JOB RELATED INJURY,AGREEING WITH THE DOCTORS. EXHIBIT 2

DATE OF ON THE JOB OCCUPATIONAL DISABILITY HAPPENED JUNE 12th 1981.

THIS WILL SHED LIGHT UPON THE CASE,AND REOPEN THIS CASE,PER NEW INFORMATION,

1

APPELLANT HUMBLY REQUEST COURT APPOINT AN ATTORNEY AND FEES, CAN NOT AFFORD ONE.

2

THIS CASE HAS ANOTHER COURT NUMBER C92-102R,DISTRICT COURT IN SEATTLE,AN APPEALLENT THERE.

AND DOCKET NUMBER SE-3443-93-0178-1-1 APPELLANT,THINKS THAT THE

THIS APPEAL NUMBER 01911885 &AGENCY NO 81-30,MIGHT HAVE BEEN ACTED UPON,PUT APPELLANT DID NOT KNOW ABOUT THIS.

POSSIBILY THE AGENCY DID NOT KNOW EITHER THEY MIGHT COVER UP,BUT APPELLANT DOES NOT MAKE ISSUE OF THIS.

POSSIBILY THE DISTRICT COURT DID NOT KNOW EITHER,THEREFORE APPELLANT FEELS THIS DOCUMENT WOULD BE BEST BECAUSE IT HAS ISSUES OF ALL THREE CASES,BUT POSSIBILY PAPER REDUCTION,LESS PAPER TRAIL WILL HELP SETTLE QUICKER.

THIS IS APPELLANT FEELING AT THIS TIME,MAY WE MOVE ON THIS FIRST, THEN APPLY THE OTHER TWO TOGETHER WITH ALL ISSUES.

SINCERELY

JAMES ROBERT BURCHARD APPELLANT — APRIL 16th 1993 — JUNE P. BURCHARD WIFE

COPIES
MERIT SYSTEMS PROTECTION BOARD
AGENCY WASNINGTON,DC
DISTRICT COURT SEATTLE
APPEALS COURT CALIFORNIA

PART E

APR 19

Page

BURCHARD, JAMES R QUESTIONS/ISSUES IN OWCP/BUY BACK LEAVE CASE.

1. WHY WAS CONTINUATION OF PAY NOT ALLOWED?

COP WAS NOT APPROPRIATE SINCE AN OCCUPATIONAL ILLNESS/DISEASE WAS THE CAUSE OF THE ABSENCE. INJURIES WHICH CAN BE LINKED TO A SPECIFIC INCIDENT/ACCIDENT WITHIN A SPECIFIC DAY OR WORK SHIFT ARE COVERED BY (

2. WHY WAS LWOP DENIED?

THE RECORDS DO NOT REFLECT THAT MR. BURCHARD WAS ADVISED OF HIS RIGHT TO USE LWOP IN LIEU OF SICK OR ANNUAL LEAVE. IT IS AN APPARENT ADMINISTRATIVE ERROR.

3. THE LIFE INSURANCE RATES FORWARDED TO BUREAU OF RETIREMENT WERE WRONG.

THE ORIGINAL SEPARATION DOCUMENTS REFLECTED THE ERRONEOUS RATES FOR WD 08; SUBSEQUENTLY, THESE WERE CORRECTED AND FORWARDED WITH THE CORRECT WS 13 RATES. (A COPY OF THE CORRECTED DOCUMENT IS ATTACHED).

4. IT APPEARS HOLIDAY'S WORKED WERE NOT REPORTED CORRECTLY, ONLY 2 HOLIDAYS WERE REPORTED - THERE SHOULD BE MORE.

ALL WAGE REPORTS ARE BASED ON THE WAGES PAID FROM THE YEAR PRIOR TO THE CLAIMED DATE. THE CLAIM FORM (CA2) NAMED 12 JUNE 1981 AS THE LAST DAY OF WORK. THE HOLCAY'S WORKED WERE FROM 12 JUN 1980 THROUGH 12 JUN 1981. A COPY OF THE 1980-1981 SERVICE RECORD IS ATTACHED.

5. SUNDAY, SATURDAY AND PRESHIFT BRIEFINGS WERE NOT REPORTED.

IT IS UNDERSTOOD THAT OWCP DOES NOT CONSIDER OVERTIME PREMIUM (EVEN IF IT IS PART OF A REGULAR SCHEDULE); CONSEQUENTLY IS WAS NOT REPORTED THIS QUESTION HAS BEEN READDRESSED TO OWCP.

6. THE LEAVE ACCRUALS FROM 12 JUN 1981 - FEB 9 1982 DO NOT APPEAR TO BE CORRECT.

THE ATTACHED SERVICE RECORDS SHOW THAT LEAVE WAS ACCRUED DURING THE PERIOD OF LEAVE EXTENDING THE DATES OF PAID STATUS TO 9 FEB 1982.

7. WHAT IS BEST RECOMMENDATION FOR LEAVE BUY BACK SITUATION?

IT APPEARS THE MOST FINANCIALLY ADVANTAGEOUS TO MR. BURCHARD TO BUY BACK ONLY THE ANNUAL LEAVE. IF OWCP PAYS AT THE RATE OF 307.78 PER WK AMOUNT OWED TO MR. BURCHARD WOULD BE APPROXIMATELY $4,300.00 BEFORE DEDUCTIONS FOR TAXES. (SEE THE ATTACHED ESTIMATES).

IF MR. BURCHARD WISHES TO BUY BACK ALL SICK AND ANNUAL LEAVE AND HAVE THE SICK LEAVE (805 HOURS) FORWARDED TO OPM FOR RETIREMENT BENEFITS CALCULATION THE MONETARY EFFECT WOULD BE: APPROX. $1,000 OUT OF POCKET FROM MR. BURCHARD.

PLEASE NOTE THESES ESTIMATES ARE BASED ON THE ASSUMPTION THAT OWCP WILL PAY AT THE RATE OF 307.78 PER WEEK. IF THIS FLUCTUATES SO WILL OWED TO THE EMPLOYEE.

RECEIVED
APR 1988
DISTRICT
OFFICE

[7a]

3/08/94 13:58 006

DEPARTMENT OF THE NAVY
PUGET SOUND NAVAL SHIPYARD
BREMERTON, WASHINGTON 98314

IN REPLY REFER TO
1811SLS:mm
12713
30 March 1983

APR 19

MEMORANDUM OF SETTLEMENT

This memorandum represents a settlement agreement between James R. Burchard and the Puget Sound Naval Shipyard, resolving the matter of a discrimination complaint. The terms of the agreement are as follows:

Puget Sound Naval Shipyard agrees and promises as an act of the Equal Employment Opportunity Officer, to so modify your official personnel record to reflect that your status at the time of your retirement was as a WS-53083-13. The date of retirement, for the purpose of this agreement, is the date Workman's Compensation or the retirement annuity commenced, whichever is the earlier date.

In return, you will withdraw your complaint that is now before the Equal Employment Opportunity Commission and agree to bring no administrative or civil actions against the Department of the Navy or any of its employees concerning this same complaint in the future.

STEVEN L. SEATON
LCDR, JAGC, USN
Legal Officer

I have read and agree to the above settlement.

JAMES R. BURCHARD
Complainant
Dated 30 March 1983

WILLIAM L. DENEND
Complainant's Representative
Dated 30 March 1983

MEMORANDUM OF SETTLEMENT
PAGE 1 OF 1

A 67 11

07/03/94 13:58 007

B

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Review and Appeals
5203 Leesburg Pike, Suite 900
Falls Church, Virginia 22041

MAY 20 1988

Mr. James R. Burchard
996 Olney Street East
Port Orchard, WA 98366

RE: 01.88.1848

Dear Mr. Burchard:

This is in response to your letter of May 11, 1988, to the Office of Review and Appeals (ORA), asking certain questions regarding your appeal. We will attempt to clarify the issues:

1. We have changed our records to show that the appellant is James Burchard, not June Burchard. It would assist us if further correspondence was signed by or referred to only James.

2. ORA means Office of Review and Appeals. ORA docket number is the number referenced above which this office has assigned to designate your appeal.

3. You do not have to have an agency number to pursue your appeal. That information will be furnished from files requested from the agency. However, it would greatly expedite matters if you were to supply us a copy of the final agency decision that you indicate you received on March 30, 1988.

4. The Office of Review and Appeals can not assist you in filing a civil suit against the agency. However, if you were to file a civil suit at this point, we would have to cease processing your appeal as the Office of Review and Appeals would have no further jurisdictional authority.

5. One of the places you may locate 29 C.F.R., Part 1613 is the public library.

6. We have received all papers you have previously submitted.

We hope we have addressed all of your concerns. Enclosed are two pamphlets on the complaints and appeals process. If you need additional assistance, please let us know.

Sincerely,

Loretta Y. Watson

Loretta Y. Watson
Equal Employment Specialist
Compliance & Control Division
(703) 756-6083

Enclosure

21 11